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NO. 84-1300

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWIN C. UDEY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONSE TO GOVERNMENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Authorities	1
Response to Opposition Statement	1
Response to Opposition Argument	2
Conclusion	6

TABLE OF AUTHORITIES

CASES

	Page
Remmer v. U.S., 74 S.Ct. 450	4
U.S. v. Faul, 748 F.2d 1204 (Petitions for Cert. pending Nos. 84-1373, 84-6332, and 84-6350)	2
U.S. v. Udey, 748 F.2d 1231	3

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Response to Opposition Statement

"Kahl was a tax protestor and a member of an extremist organization known as Posse Comitatus."

If this statement of the Government is true, it is totally unsupported by the record and is not referenced to the transcript.

The transcript of the case, *U.S. v. Faul,* (748 F.2d 1204) has not been provided to Petitioner and is not relevant to this case.

Almost the entire page 3 of the Government's "statement" is irrelevant to the issues before this Court. It is as if the Government wanted to press its guilt by association case to this Court. The Eighth Circuit also consolidated the cases for a back-to-back hearing in Omaha, Nebraska and the cases were published back to back.

The Government's position is that in addition to Udey's familiarity with others convicted of harboring Kahl, Udey was also present when a statement was made that the F.B.I. is closing in. (See Appellee's brief in opposition, page 4). The four (4) dissenters including Chief Justice Lay of the Eighth Circuit dispute this version, so does the record.

Response to Opposition Argument

1. The Government argues that this Court cannot reconsider the facts. As a general rule that is the case. In the instant case however, we have a fact situation clearly disputed by four (4) members of the Eighth Circuit and questioned by the trial Judge as possibly being inadequate.

The clear finding of guilt by association is a constitutional issue violating due process and the implied freedom of association of the First Amendment through the freedom to peaceably assemble.

The Government's assertion that "the only element disputed by Udey is whether he had knowledge that Kahl was a fugitive" is patently absurd. All other issues are obviously disputed. The raising of the issue regarding his knowledge of a warrant obviously also raises the issue

of his involvement in the act of harboring. If the Petitioner had no knowledge the man was a fugitive from the process of a Federal warrant, he could not have harbored the man.

The ". . . widespread media coverage of . . . events in North Dakota . . ." which extended into Arkansas' news as a minor story and which did not necessarily reach the Petitioner or reveal the Federal warrant, cannot be added to Udey's more substantial knowledge of Kahl obtained after the Arkansas fire which made Arkansas headlines, to allow speculation that Udey therefore knew *before* the Arkansas front page publicity that Kahl was a Federal fugitive as the term is defined by statute and case law. (See Petitioner's brief).

The Government in its argument has ignored the issue. The issue is:

A) Since the Eighth Circuit *standard* of proof is now different from its prior standard and different from all other circuits, how will this Court resolve this conflict between the circuits?

B) Is the finding of the Court of Appeals in light of the record unacceptable?

C) Does the First Amendment or any other constitutional guarantee protect freedom from guilt by association?

Robertson's direct testimony does not, as the Government maintains, say Udey was present at the time of "the F.B.I. is closing in" speech, it only leaves that open as a possibility, but regardless of the possibility when directly asked if Udey was present, she replies that he was not. (See dissenting opinion *U.S. v. Udey*, 748 F.2d 1231).

2. Argument Part II(A) is unsupported by the record. The stipulated "highly prejudicial" Exhibit Government "8" was admitted into evidence. If the Government now contends that it was not published to the jury, the Government must show how an admitted exhibit, admitted over Petitioner's strenuous objection and vigorous offer of stipulation to any potentially "relevant" facts, in a futile effort to exclude the exhibit, failed to reach the jury. The record does not reflect this.

Argument Part II(B) of the Government raises no new issues, but cites several cases which sometimes support Petitioner's position and other times are not relevant to the instant case.

Argument Part II(C). The Government's case is more nearly defeated by its citations than helped. The Government's cases cited in II(B) support Petitioner's position.

The Government's cited case, *Remmer v. United States*, 74 S.Ct. 450, supports Petitioner's position with regard to the photography session [Government argument II(e)] and the winking incident.

The winking incident was not investigated. The photography incident was investigated ex-parte. The Petitioner was not able to "listen to" the juror's explanations until receiving the appellate transcript and was never allowed to examine the jurors. *Remmer*, a Supreme Court decision, was reversed by the trial Court's actions.

3. The Government's third argument is harder to accept than its first. The Government first argues that the Petitioner, by raising the issue of lack of knowledge of a warrant, did not by this action also raise the issue of non-participation in a scheme to avoid the warrant.

Now the Government concedes the offer of proof denied to the jury by the trial Judge would have demonstrated F.B.I. sponsored arson, but that it is irrelevant since it does not also raise the issue that the intentional act of committing arson logically infers the arsonists intended the obvious result of their actions: the destruction of whatever was in the shelter, the object of the arson: a human body.

The Government, in a curious contrast in this case, first argues that the association and knowledge with harborers is sufficient circumstantial evidence to prove actual knowledge and assistance in a harboring conspiracy; while on the other hand, in the same case, the acts of arson by Government officials is not sufficient circumstantial evidence to show that by the act said officials intended, as the natural outcome of their act, to destroy everything in the shelter including the suspect's fingerprints. Perhaps the Government's explanation for the missing hands (with fingerprints) and feet would have been examined more skeptically, had the jury been apprised of the cause of the fire. The logical reason of the arson was to prevent the identification of the corpse that might not have been Gordon Kahl.

In any event, the Government urges that, since there was clear and convincing evidence by Government witnesses that the corpse was Kahl, why allow evidence which would cast aspersions on the Government witnesses' credibility and give the jury the option to find the Government's position not credible beyond a reasonable doubt? Reason: Because, absent evidence by both sides, you don't have an impartial jury or a fair trial. If all exculpatory evidence is omitted there will seldom be a case in which the incriminating evidence, no matter

how slight, will not be sufficient to sustain a conviction. The only thing missing is a witch burning at the stake, and we have come pretty close to that in the instant case.

Conclusion

For all of these reasons stated herein and in Petitioner's Brief, either a judgment of acquittal or a new trial for the Petitioner should be granted.

Respectfully submitted,

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